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No. 85-766

In the Supreme Court of the United States
October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ARIZONA, DELAWARE, FLORIDA, ILLINOIS, LOUISIANA, MAINE, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE AND WYOMING IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

ROBERT ABRAMS
Attorney General of the
State of New York

ROBERT HERMANN
Solicitor General
Counsel of Record
Two World Trade Center
New York, New York 10047
(212) 488-3710
(Additional List of Counsel on Inside Pages)

BEST AVAILABLE COPY

ROBERT K. CORBIN
Attorney General of the State
of Arizona
ANTHONY B. CHING
Solicitor General
Amicus Curiae

CHARLES M. OBERLY, III
Attorney General of the State
of Delaware
Amicus Curiae

JIM SMITH
Attorney General of the State
of Florida
Amicus Curiae

NEIL F. HARTIGAN
Attorney General of the State
of Illinois
ROMA J. STEWART
Solicitor General
Amicus Curiae

WILLIAM J. GUSTE, JR.
Attorney General of the State
of Louisiana
Amicus Curiae

JAMES E. TIERNEY
Attorney General of the State
of Maine
CABANNE HOWARD
Deputy Attorney General
Amicus Curiae

BRIAN MCKAY
Attorney General of the State
of Nevada
Amicus Curiae

LACY H. THORNBURG
Attorney General of the State
of North Carolina
Amicus Curiae

NICHOLAS J. SPAETH
Attorney General of the State
of North Dakota
Amicus Curiae

ANTHONY J. CELEBREZZE, JR.
Attorney General of the State
of Ohio
Amicus Curiae

MICHAEL TURPEN
Attorney General of the State
of Oklahoma
Amicus Curiae

LEROY S. ZIMMERMAN
Attorney General of the State
of Pennsylvania
Amicus Curiae

W. J. MICHAEL CODY
Attorney General of the State
of Tennessee
Amicus Curiae

A. G. MCCLINTOCK
Attorney General of the State
of Wyoming
Amicus Curiae

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INTEREST OF AMICI CURIAE

Amici Curiae States submit this brief pursuant to Rule 36 in support of the Jurisdictional Statement of the State of Connecticut.

Certain of the Amici[1/] have similar statutes to Connecticut's in that enrollment with a political party is a requirement to vote in primary election contests. The majority of the States have such statutes. These state statutes are

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1/ See, e.g., Ariz. R.S. § 16-467; 21-A Me. R.S.A. § 143; N.Y. El. L. § 8-302.4; N.C. Gen. Stat. § 163-59; Tit. 26 Okla. Stat. § 1-104; Wyo. El. Codes § 22-5-212.

directly threatened by the ruling of the Second Circuit.

Other Amici[2/] do not require party enrollment to participate in primaries. Nonetheless, the holding of the Second Circuit will have a significant effect on the election statutes of those states because it calls in question virtually any attempt by a State to regulate the primary process. All States that do provide for open primaries do so by statute. The logic of the Second Circuit opinion would invalidate these statutes any time a political party were to adopt a party rule inconsistent with such statutes.

2/ See, e.g., La. R.S. § 18:401 et seq.; N.D. Cent. Code § 16. 1-11-22.

Indeed, to our knowledge, not a single state in the nation leaves eligibility for voting in primaries to the discretion of the political parties--which is the result to which the Court of Appeals decision leads.

This Court should note probable jurisdiction and grant plenary review to resolve the Amici States' authority to regulate the nomination process. As both the Second Circuit and the District Court in this case recognized, the issues in this litigation have profound implications for electoral regulation nationally. Plenary review by this Court is particularly important at this time because

the nature of electoral regulation, and particularly election schedules, does not afford the States any latitude for continued uncertainty.

Summary of the Argument

The Second Circuit holding, which gives political parties the authority to establish voter qualifications even where there is a contradictory state statute, flies in the face of numerous precedents of this Court and other federal courts. The states, through their legislative and executive branches, have traditionally been allowed to determine primary voting requirements. The holding below threatens not only the power of states to

regulate eligibility requirements, but also their power to control any other nomination procedures, even a requirement that primary elections be held at all.

Moreover, the Court of Appeals has seriously misinterpreted two significant holdings of this Court on associational rights--Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981), and Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984). The Second Circuit has extended the associational rights recognized in these cases to illogical extremes that endanger the integrity of the electoral process and that will create chaos rather than order in elections.

Cf. Storer v. Brown, 415 U.S. 724, 730 (1974). The critical issues regarding election administration raised by this case should be resolved prior to the next federal elections in 1986.

ARGUMENT

1. The issue raised by Connecticut's jurisdictional statement is not one unique to Connecticut. It is not a partisan issue, nor does it cast this Court into the perennial political science dispute between the advocates of "open" and "closed" primaries. Simply put, the constitutional right of the states to regulate the party nomination process is at stake.

The Second Circuit concluded (J.S. App. 98) that "the selection of candidates by a political party is a function that properly falls to the party and not the state." Under the opinion of the Court of Appeals, where a party rule contradicts a state statute, in this area the party rule prevails. As set forth in the Addendum to this brief, every state regulates the issue of who is eligible to vote in a primary. Each state's election laws are, therefore, subject to being invalidated under the Second Circuit's holding. In addition, the extraordinarily wide sweep of the decision places in jeopardy the efforts of the States to regulate the mechanics of the petition

process, campaign financing of nominations, and the statutory requirement to conduct a primary in the first instance.

The Second Circuit's holding contradicts clearly established precedent regarding the role of states in regulating primaries. The leading case of Nader v. Schaffer, 417 F.Supp. 837 (D.Conn.) (three-judge court), aff'd mem., 426 U.S. 789 (1976) declared correctly that "[e]ach state legislature chooses the primary election scheme that it thinks will best promote democratic, electoral and governmental goals," 417 F.Supp at 843. Nader affirms that a state has an interest beyond that of the parties and

broad discretion in formulating primary election policies. Id. at 845, 850. See also Tansley v. Grasso, 315 F.Supp. 513, 519 (D.Conn. 1970) (three-judge court) (upholding statutory "20% rule" to conduct a primary).

More generally, this Court has consistently noted the "legitimate and valid" role of the states in regulating the electoral process. Rosario v. Rockefeller, 410 U.S 752, 761 (1973). Indeed, as the Court declared in Storer v. Brown, 415 U.S. 724, 730 (1974):

> [T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the

> time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.
>
> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases.... (Emphasis added).

See also Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (state's important regulatory interests are "generally sufficient to justify reasonable, nondiscriminatory restrictions" on a variety of voting rights); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (this Court applied a "not unreasonable" standard in upholding an election statute against a substantial

constitutional challenge); Marchioro v. Chaney, 442 U.S. 191 (1979) (statute upheld despite contrary party rule). 3/

Disregarding this precedent, the Second Circuit has held that a state's right to control a publicly sponsored and

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3/ The Court has indicated the constitutional underpinings of this deference to state authority rest in Art.I, § 4 and the Tenth Amendment. See Storer, at 729-730; Rodriquez v. Popular Democratic Party, 457 U.S. 1, 8 (1982). Garcia v. San Antonio Metro Transit Authority, 105 S.Ct. 1005 (1985) in overruling National League of Cities v. Usery, 426 U.S. 833 (1976) particularly relied upon the "States' residuary and inviolable sovereignty," derived from the Constitution's election provisions as the States' primary source of protection from overreaching by the federal government.

funded[4/] primary is nullified in the face of the contrary rule of a political party. This holding will create disorder and confusion in enforcement of election laws. Legitimate, non-discriminatory statutes will be perennially subject to the shifting views of political coalitions. The stability favored by Storer and Anderson will be jeopardized.

4/ The ballot preference and expenditure elements of the primary process for the major parties certainly justify state control of the process. As Justice Holmes observed when a Massachusetts judge in a preferential ballot access case: "The legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage." Commonwealth v. Rogers, 181 Mass. 184, 63 N.E. 421, 423 (1902).

2. The holding of the Second Circuit conflicts with two recent decisions of this Court and requires clarification. The Second Circuit states that Democratic Party of the United States v. Wisconsin, ex rel. LaFollette, 450 U.S 107 (1981) supports the proposition that "a state may not interfere with the associational rights enjoyed by political parties and their adherents." (J.S. App. at 96). That case simply cannot be read for such a proposition.

The Court in Democratic Party relied centrally on Cousins v. Wigoda, 419 U.S. 477 (1975), which was decided "in the context of the selection of delegates to

the National Convention." 450 U.S. at 121. The Democratic Party Court made very clear that the issue in that case was extraterritoriality-- the effect of a Wisconsin statute on a national party. The Court made explicit that Wisconsin's authority to regulate state parties was not in question. 450 U.S. at 120 and n. 21.

In Cousins, the Court stated that selection of delegates to national conventions could not be left to the law of each state. "Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in

the vital process of choosing Presidential and Vice-Presidential candidates--a process which usually involves coalitions cutting across state lines." Id., 490. (Emphasis added) "[T]he pervasive national interest" had to prevail. Id.

Justice Powell in Cousins, concurring and dissenting in part, but on an undisputed point, noted: "I also agree with the Court that this case intimates no views regarding other efforts to regulate party conventions. Congressional regulations of national conventions or state regulation of primaries or conventions for state office raises different considerations requiring a wholly different balance." Id, 497,* note.

See also Rotunda, "Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda," 53 Tex.L.Rev. 935, 963 (1975); Novak, Rotunda and Young, Constitutional Law, (2d ed., 1983) at 786 ("...a state may not attempt, as it did in Wigoda, an extraterritorial extension of state jurisdiction to enforce otherwise valid laws"); Note, "State Regulation of National Parties," 95 Har.L.Rev. 241, 249-250 (1981); Rotunda letter, J.S. App. 239. The approach of the Second Circuit is thus inconsistent with the prior decisions of this Court.[5/]

5/ See also Bellotti v. Connolly, 460 U.S. 1057 at 1063 (1983), in which

(footnote cont'd)

The Second Circuit has improperly made use of Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984) in equating the political parties to associations (such as the family) constituting an "intimate human relationship." (J.S. App. 72). Indeed, it stretches credulity that a political party could be so characterized. Prior court decisions have treated the political parties in the nominating process as quasi-public bodies, representing "the 'state' in action."

(footnote cont'd from previous page)

Justice Stevens in dissent recognized that both Democratic Party and Cousins solely concerned the extraterritorial issue.

Lynch v. Torquato, 343 F.2d 370, 373 (3rd Cir. 1965). This case represents an opportunity to clarify the holding of the Roberts with respect to the associational rights of political parties.

3. The extraordinary views of the Court of Appeals with respect to associational rights are reflected in its characterization of the burden imposed upon Connecticut law as being so great as to require the State to demonstrate a compelling state interest to justify that burden. The only "burden" imposed by Connecticut law is that someone who wishes to vote in a primary election of a party register with that party up to the day before the election.

Compare this "burden"--imposed on people who, by definition, elect not to associate with a party through affiliation--with that in Rosario by a person who wanted to participate in a primary, but could not because he resided in New York for less than eleven months. This Court found that much greater burden in Rosario to be insufficient to trigger a compelling interest test. See also Tribe, American Constitutional Law § 13-23 at 793: "Absent a willingness to profess such affiliation, it would be tenuous to assert that substantial associational rights were being abridged; without a communality of interests, there is little association to abridge."

The rhetoric about political and associational rights underlying the Court of Appeals decision becomes little less than remarkable in light of the associational interests actually implicated by this case--interests the Court of Appeals chose not to examine critically.

The fact that the Court of Appeals could determine that an associational burden as minimal as the one at issue in this case triggers a compelling interest test is a clear and additional indication that review by this Court is essential to prevent widespread challenges to myriad, legitimate state election laws.

4. This is not a case where it is appropriate for the Court to await a conflict among the Circuits before accepting the matter for review. Election law questions often need immediate answers. This Court has addressed, for example, the constitutionality of enrollment deadlines, Rosario v. Rockfeller, to resolve this question before the next scheduled election, and where no square conflict yet existed.

This is then a classic case where there will be chaos in election administration until there is an authoritative ruling of the Court.

CONCLUSION

This Court should note probable jurisdiction.

RESPECTFULLY SUBMITTED,

ROBERT ABRAMS
ATTORNEY GENERAL of the
State of New York

ROBERT HERMANN
Solicitor General
Counsel of Record

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(Additional list of Counsel on Inside Pages)

Addendum

Types of State Primaries

According to the Book of the States (Council of State Governments, 1984), Table 9, 38 states have a "closed" primary in which voters receive only the ballot of their party choice. Voters in these primaries must declare their party affiliation on or before the day of the primary election.

Nine states have an open primary in which voters receive a ballot for all parties and select the party of their choice in the voting booth.

Two states have a blanket primary in which voters are not restricted to one party but can vote for different offices among different parties. However, they may vote only once for each office.

Alabama by statute delegates to the parties who is eligible to vote in a primary, but requires party membership to participate.